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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/033,030	11/09/2001	Ted Gower	1789.009	9991

21917 7590 12/05/2003

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EXAMINER

FITZGERALD, JOHN P

ART UNIT	PAPER NUMBER
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3637

DATE MAILED: 12/05/2003

Please find below and/or attached an Office communication concerning this application or proceeding.

# Office Action Summary

Application N .

10/033,030

Applicant(s)

GOWER, TED

Examiner

John P Fitzgerald

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

## Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

## Status

- 1) ☒ Responsive to communication(s) filed on 08 September 2003.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

## Disposition of Claims

- 4) ☒ Claim(s) 1-16 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-16 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

## Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

## Priority under 35 U.S.C. §§ 119 and 120

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- \* See the attached detailed Office action for a list of the certified copies not received.
- 13) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application) since a specific reference was included in the first sentence of the specification or in an Application Data Sheet. 37 CFR 1.78.
- a) ☐ The translation of the foreign language provisional application has been received.
- 14) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121 since a specific reference was included in the first sentence of the specification or in an Application Data Sheet. 37 CFR 1.78.

## Attachment(s)

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449) Paper No(s) \_\_\_\_\_.
- 4) ☐ Interview Summary (PTO-413) Paper No(s). \_\_\_\_\_.
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: \_\_\_\_\_.

## **DETAILED ACTION**

### ***Response to Amendment***

1. In view of applicant's amendment filed 08 September 2003, rejections under 35 U.S.C. § 112, first paragraph, are withdrawn. However, rejections under 35 U.S.C. § 112, second paragraph remain present.

### ***Claim Rejections - 35 USC § 112***

2. Claim 1, 12 and 13 are rejected under 35 U.S.C. § 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. Claim 1 states that the panel is spaced apart from the structure "a minimum deflection distance." The "minimum deflection distance" is not defined by the claim, the specification does not provide a standard for ascertaining the requisite degree, and one of ordinary skill in the art would not be reasonably apprised of the scope of the invention. Claim 13 states: "a maximum deflection of approximately 20% before failure and air permeability of approximately 250cfm at a wind force of 1 inch Hg." It is unclear how the "maximum deflection" is represented as a non-dimensional percentage value, since "deflection" is a dimensional value, typically having length units (eg. mm, cm, inches, feet, etc.). Furthermore, if a percentage value is to be claimed, it must be based upon a characteristic dimension of the "panel" that changes or alters in some manner, within a specific plane within which the characteristic dimension resides. For example, a relationship involving the ratio of the original, non-deflected characteristic length to the deflected characteristic length, or a strain value, wherein the change in the characteristic length is divided by the original, non-deflected length. Specifically regarding the "air permeability" of approximately 250cfm must be based on

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a pressure, not simply a force of 1 inch Hg. Further along this same line of reasoning, it is unclear if the pressure force of 1 inch Hg is considered to be "gauge pressure," "absolute pressure," "dynamic pressure," or a combination thereof. Additionally, there are various methods of which a volumetric flow rate is calculated. It is typically based upon a characteristic area of material through which the flow rate is calculated. It is unclear what method and/or characteristic area value the applicant is applying in determining the air permeability of approximately 250cfm.

3. Claim 12 recites the limitation "said curtain means" in line 3. There is insufficient antecedent basis for this limitation in the claim

#### ***Double Patenting***

4. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and, *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

5. Claim 1 is rejected under the judicially created doctrine of double patenting over claim 10 of U. S. Patent No. 6,325,085 since the claims, if allowed, would improperly extend the "right to exclude" already granted in the patent.

The subject matter claimed in the instant application is fully disclosed in the patent and is covered by the patent since the patent and the application are claiming common subject matter, as follows: a kit or device for protecting a portion of a structure comprising a flexible material or textile with a fail/burst strength of 61.3 psi, which falls within the range of 61.3 and 675 psi; the flexible material or textile having a mesh or interstice size being greater than 3/16 inches = 4.7625 mm, which falls within the range of 0.6 to 4.8 mm, the mesh or interstice size chosen to prevent passage of wind born objects of the corresponding size (3/16 inches); and edges having means for securing the textile material corresponding to a peripheral hem "adapted to" secure the panel to the structure.

Furthermore, there is no apparent reason why applicant was prevented from presenting claims corresponding to those of the instant application during prosecution of the application which matured into a patent. See *In re Schneller*, 397 F.2d 350, 158 USPQ 210 (CCPA 1968). See also MPEP § 804.

***Claim Rejections - 35 USC § 103***

6. The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

7. As best understood, claims 1-8 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Gitlin et al. and applicant's disclosure. Gitlin et al. disclose a protective barrier device for protecting frangible portions of a structure from wind force and wind born objects (Figs. 1-10) (Gitlin et al: col. 2, lines 9-17) having at least one panel (22, 23, 24); a peripheral hem (26) "adapted to" secure the panel to the structure whereby the panel is spaced apart from the structure a minimum deflection distance to allow for deceleration of objects impacting the panel before the objects impact the frangible portions of the structure; wherein the panel is a flexible textile formed of synthetic threads of polypropylene or polyethylene resistant to ultra violet, biological and chemical degradation and further being porous to light in various percentages of transparency while simultaneously being porous to wind (Gitlin et al.: col. 3, lines 23-46); and wherein the peripheral hem has a plurality of releasable fasteners (69), some of the fasteners "adapted to" to attach to ground anchors (62) to secure the panel in the spaced apart relation to the structure. Applicant discloses that "current impact test of certain locales" requires a wood 2x4 stud to be shot at a protective barrier exerting a total force of approximately 230 pounds, or 61.3 pounds per square inch (psi) (page 10, lines 7-14). Applicant further discloses that building code regulations of Dade County, Fla. Require that the smallest diameter missile with which they are concerned is 3/8 inches = 9.525 mm (page 20, lines 20-23). It would have been obvious to one of ordinary skill in the art at the time the invention was made to modify the protective barrier device disclosed by Gitlin et al., by employing a flexible textile fabric having

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the claimed physical properties to meet or exceed current standards in testing and building code regulations required by particular locales. In specific regards to claims 6 and 7, it is considered well known in the art to provide various layers, coatings or films such a vinyl to textiles and fabrics to increase their resistance to moisture penetration as well as increase durability.

8. As best understood, claims 13-16 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Gitlin et al. and applicant's disclosure. Gitlin et al. disclose a protective barrier device for protecting frangible portions of a structure from wind force and wind born objects (Figs. 1-10) (Gitlin et al: col. 2, lines 9-17) having at least one panel (22, 23, 24); a peripheral hem (26) "adapted to" secure the panel to the structure whereby the panel is spaced apart from the structure a minimum deflection distance to allow for deceleration of objects impacting the panel before the objects impact the frangible portions of the structure; wherein the panel is a flexible textile formed of synthetic threads of polypropylene or polyethylene being porous to light in various percentages of transparency while simultaneously being porous to wind due to variations in mesh size (Gitlin et al.: col. 3, lines 23-46); having upper and lower edges, the lower edge "adapted to" to attach to the ground in such a manner to secure the panel in the spaced apart relation to the structure. Applicant discloses that "current impact test of certain locales" requires a wood 2x4 stud to be shot at a protective barrier exerting a total force of approximately 230 pounds, or 61.3 pounds per square inch (psi) (page 10, lines 7-14). Applicant further discloses that building code regulations of Dade County, Fla. Require that the smallest diameter missile with which they are concerned is 3/8 inches = 9.525 mm (page 20, lines 20-23). It would have been obvious to one of ordinary skill in the art at the time the invention was made to modify the protective barrier device disclosed by Gitlin et al., by employing a flexible textile

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fabric having the claimed physical properties to meet or exceed current standards in testing and building code regulations required by particular locales. Furthermore, Gitlin et al. disclose that variations in the mesh size of the flexible textile fabric can be made to allow for variations in desired porosity of light and wind. These changes in mesh size, in turn, inherently vary the “physical” characteristics of the flexible textile fabric, thus achieving various values of “maximum deflection” percentages, such as 20% before failure, as well as variations of porosity of wind such as 250cfm at a wind force of 1 inch Hg. Additionally, it is well within the capabilities of one of ordinary skill in the art to modify the mesh size or choose a particular flexible textile fabric having the desired mesh size, and thus, the inherent physical properties associated therewith; to protect a building structure based on building code requirements of particular locales. In specific regards to method claims 14-16, the claims have not been given any patentable weight for they fail to further limit the article claim 13.

### *Response to Arguments*

9. Applicant's arguments filed 08 September 2003 have been fully considered but they are not persuasive. In regards to the rejections under 35 U.S.C. § 112, second paragraph, Applicant unsuccessfully argues the relationship between “minimum deflection distance” and “maximum deflection.” In particular, the recited “maximum deflection of approximately 20%” is solely recited in claim 13, and is not present within the specification. Applicant further argues that 1 inch Hg pressure, is to be measured as an over-pressure. The term “over-pressure” is not recognized in the art, nor is the term utilized within the Applicant's specification. The Examiner reasserts the rejections under 35 U.S.C. § 112, second paragraph above. In regards to the double



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patenting rejection of claim 1 over claim 10 of U.S. Patent No. 6,325,085, the Applicant argues that the instant application is directed to a material for external use and in which one edge is connected to the building and the opposite edge connected to the ground. However, the Examiner asserts that claim 1 is devoid of any such limitations, and therefore, as claimed, extends the monopoly of claim 10 of U.S. Patent No. 6,325,085. In specific regards to Applicant's argument regarding the use of the Applicant's disclosure in the rejection of claims 1-8 and 13-16, the Applicant clearly states the building code regulation of Dade County Florida and the requirements set-forth within. Clearly, the building code regulations of Dade County Florida are public knowledge for all to follow in performing various types of construction within Dade County Florida. As such, the use of the Applicant's quotations of the building code requirements of Dade County Florida are completely applicable in formulating obviousness rejections in combination with other references.

### ***Conclusion***

10. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event,

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however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

11. Any inquiry concerning this communication or earlier communications from the examiner should be directed to John P. Fitzgerald whose telephone number is (703) 305-4851. The examiner can normally be reached on Monday-Friday from 7:00 AM to 3:30 PM. If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Lanna Mai, can be reached on (703) 308-2486. The fax phone number for the organization where this application or proceeding is assigned is (703)-872-9306. Any inquiry of a general nature relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is (703) 305-1113.



JF

12/01/2003

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